IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LYON FINANCIAL SERVICES, INC., d/b/a/ U.S. BANK PORTFOLIO SERVICES, for the benefit of U.S. BANK NATIONAL ASSOCIATION, as Trustee	:	CIVIL ACTION
	:	
	:	No. 05-3084
v.	:	
CLEAR SKY MRI AND DIAGNOSTIC CENTERS, INC., et al.	:	

MEMORANDUM

Juan R. Sánchez, J. **August 10, 2006**

Plaintiff, Lyon Financial Services, Inc., doing business as U.S. Bank Portfolio Services ("USBPS"), moves for partial summary judgment on its breach of contract claims, arguing Defendants have defaulted on their express promises to repay five leases and three loans. In addition to raising objections to USBPS's proffered evidence, Defendants respond there are genuine issues for trial because their payment obligations under the leases and loans have not matured. The vast majority of USBPS's evidence is competent, and there is no factual dispute on the issue of Defendants' contractual liability, so I will grant USBPS's motion in part. I reserve ruling on the amount of damages to which USBPS is entitled until after I conduct a bench trial on that issue and USBPS's remaining claims for relief.

FACTS

Throughout 2001 and 2002, DVI Financial Services, Inc., a commercial finance company, entered into various master lease and loan agreements with three medical centers: Clear Sky MRI

and Diagnostic Center at Brookhaven, Inc., Clear Sky MRI and Diagnostic Center at Denton, Inc., and Clear Sky MRI and Diagnostic Center at North Dallas, Inc. Pursuant to the terms of the master agreements, the parties executed five equipment schedules, each of which constitutes a "net lease," and three secured promissory notes. Each master lease and loan is between DVI and one obligor (*i.e.*, only one medical center is a party to each contract with DVI). DVI contracted separately with Clear Sky MRI and Diagnostic Centers, Inc., Richard D. Chandler,[1] and the DDG Trust to unconditionally guarantee, jointly and severally, each medical center's contractual promise to pay.[2] The medical centers also guaranteed some of the leases and loans. On October 29, 2002, subsequent to consummating the leases, loans, and guaranties, DVI, the Clear Sky entities, the DDG Trust, and Chandler all executed a "Cross Collateral/Cross Default Rider," which makes a default under one transaction a default under all others. (Attached to this Memorandum is an Appendix that summarizes the transactions between DVI and the Defendants.)

DVI provided financing to companies in the healthcare industry and obtained its working

---

[1]Richard Chandler executed the guaranties at issue here, but died prior to the initiation of this lawsuit. His estate is named as a Defendant.

[2]Each guaranty contains the following provision:

> **2. The Guaranty.** Surety hereby irrevocably, unconditionally and absolutely guaranties to DVI, its successors, endorsees and assigns (a) the prompt payment when due, whether at maturity or upon earlier acceleration, of all Guaranteed Obligations and (b) the prompt and complete compliance with and performance by each Obligor of all covenants, agreements, indemnities and other obligations to be performed by each Obligor pursuant to the terms of the Loan Documents.

(Pl.'s Mot. Summ. J. Exs. 10, 11, 12, 15, 16, 17, 18, 19, 22, 23, 24, 27, 28, 29, 32, 33, 34, 37, 38, 39, 40, 41.)

capital by "securitizing" the leases and loans it held. Securitization is a form of commercial finance that involves the pooling and sale of financial assets in exchange for funds from institutional investors. Thus, to generate funds to finance the leases and loans it made, DVI routinely sold, assigned, and conveyed its interest in these contracts to "special purpose entities" (*i.e.*, intermediaries), which, in turn, issued asset-backed notes in favor of institutional investors. The special purpose entities then pledged the financial assets to a trustee. DVI transferred the contracts it entered into with the Defendants to special purpose entities that subsequently pledged the assets to U.S. Bank. DVI, though, continued to service these contracts even after it pooled and transferred them.

On August 25, 2003, DVI voluntarily filed for bankruptcy protection in the United States Bankruptcy Court for the District of Delaware. The bankruptcy court, by way of Order dated February 3, 2004, approved a settlement agreement that appoints USBPS "successor servicer" of the financial assets pledged by DVI. As successor servicer, USBPS is required to administer the transactions DVI entered into with the Defendants. In between the time that DVI declared bankruptcy and the approval of USBPS as successor servicer, the Clear Sky medical centers ceased making required lease and loan payments.

Each "Master Equipment Lease" contains the following unconditional promise on the part of the lessee to pay rent for the leased equipment:

> **2.2. Lease Payments.** Obligor will pay all sums due under each Schedule at such time and in such amounts as set forth in that Schedule. DVI and Obligor acknowledge and agree that each Equipment Schedule constitutes a net lease and that Obligor's obligation to pay all rent and any and all amounts payable by Obligor under any Equipment Schedule shall be absolute and unconditional, and shall not be subject to any abatement, reduction, setoff, defense,

> counterclaim, interruption, deferment or recoupment for any reason whatsoever; and that such payments shall be and continue to be payable in all events.

(Pl.'s Mot. Summ. J. Exs. 6, 20, 25.) An "Event of Default" under the leases occurs "[i]f Obligor fails to make any payment of principal or interest or any other payment on any Schedule or any other Obligation when due and payable, by acceleration or otherwise, and such failure continues for ten (10) calendar days after such amount is first due." (*Id.*) Each Clear Sky medical center was required to make a regularly scheduled lease payment on November 1, 2003; however, the payment histories submitted by USBPS reveal not one of the centers tendered this payment or any subsequent ones. (Pl.'s Mot. Summ. J. Ex. 5.) Upon the occurrence of an Event of Default:

> (a) DVI may, at its option, declare all obligations owed to it, including, without limitation, all Leases held by DVI, to be due and payable immediately, whereupon they will immediately become due and payable without presentment, demand, protest, or notice of any kind, all of which are hereby expressly waived by Obligator, and
>
> (b) DVI may exercise any right or remedy available to it under this Agreement, any Schedule, any Security Documents, any other Lease Document or otherwise available at law or equity.

(Pl.'s Mot. Summ. J. Exs. 6, 20, 25.) The leases and related schedules "inure to the benefit of Obligor and DVI and their respective successors and assigns," (*id.*), so USBPS, on May 14, 2004, exercised its option to declare "immediately due" all of the outstanding payments under each schedule.

USBPS did the same for the amounts due under the three notes because the medical centers failed to tender their November 1, 2003 loan payments and all subsequent ones. Like the leases, an "Event of Default" under each master loan agreement occurs "[i]f Obligor fails to make any payment of principal or interest or any other payment on any Note or any other Obligation when due and

payable, by acceleration or otherwise, and such failure continues for ten (10) calendar days after such amount is first due." (Pl.'s Mot. Summ. J. Exs. 13, 30, 35.) Under each note, the debtor's obligations commence on the date all proceeds are "fully funded," (Pl.'s Mot. Summ. J. Exs. 14, 31, 36), but Jackson Jacob, the manager of the Clear Sky Defendants, states, in an affidavit attached to Defendants' response, DVI did not "fully fund" these two notes. Specifically, DVI never advanced $73,747.00 under Secured Promissory Note 3666-001 ("Note 3666-001"), which has a face value of $501,367.61, and its failure to advance these funds subsequently led to the repossession of the equipment for which this amount was designated. Jacob also asserts DVI only advanced $792,640.97 under Secured Promissory Note 3239-001 (Note "3239-001"), which has a face value of $930,193.32. (Neither Jacobs nor any of the Defendants contend DVI did not "fully fund" Secured Promissory Note 3667-001, the third loan.)

The Cross Collateral/Cross Default Rider – the final contract executed by DVI and the Defendants – impacts the Defendants' failures to make lease, loan, and guaranty payments because "[t]he occurrence of any event of default under any loan agreement, lease agreement, promissory note, security agreement, guaranty, surety or any other document, agreement, instrument or contract between any of the parties . . . shall constitute an event of default under . . . [each and every contract between DVI and the Defendants]." (Pl.'s Mot. Summ. J. Ex. 42.)

Each master lease and loan, as well as each guaranty, expressly states that all acts and transactions and the rights and obligations of the parties are to be "governed, construed and interpreted in accordance with the laws of the Commonwealth of Pennsylvania . . . ." (Pl.'s Mot. Summ. J. Exs. 6, 13, 20, 25, 30, 35.) On June 28, 2005, USBPS initiated this lawsuit to recover,

among other things, contractual damages for Defendants' failure to tender rent and loan payments.[3]

DISCUSSION

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A factual dispute is "material" if it "might affect the outcome of the suit under the governing law . . . ." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute over irrelevant facts will not preclude summary judgment. *Id.*

On a motion for summary judgment, the moving party bears the initial burden of identifying the parts of the record it asserts demonstrates the absence of a genuine issue of fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Here, the evidentiary record adduced by USBPS includes an affidavit from Jane Fox, its Director of Operations, along with a copy of the contracts and the payment histories associated with each transaction. (These documents are exhibits to the motion, as is the bankruptcy-court order approving the settlement agreement that appoints USBPS successor servicer.) Defendants object to numerous paragraphs in the Fox affidavit because they argue she has stated legal conclusions and does not have personal knowledge of some of the events recounted. Although Defendants do not specifically cite to Federal Rule of Civil Procedure 56(e) as the basis upon which they object to Fox's affidavit, I consider their argument to be grounded in this rule, which requires that "[s]upporting and opposing affidavits shall be made on personal knowledge,

[3]USBPS claims Defendants are more than $5 million in arrears. Defendants argue that even if I grant USBPS's motion, they are entitled to a credit because, according to Jacob's affidavit, USBPS's "evidence does not reflect all payments made to DVI" by the Clear Sky Defendants and "does not provide an accurate allocation of all Clear Sky Defendants' payments to DVI." (Jacob Aff. ¶ 10.) This dispute concerns damages – an issue I reserve for trial.

shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated herein." Fed. R. Civ. P. 56(e).

I agree with Defendants that some of Fox's statements are conclusory, such as her assertion that "the Clear Sky Defendants have defaulted under the Leases and Loans at issue in this action . . . [and the guarantors] have breached the terms of their respective, absolute and unconditional Guaranties." (Fox Aff. ¶ 4.) I disagree, though, with the vast majority of Defendants' objections, which relate to Fox's statements about the dates on which each Defendant ceased making payments, the date on which USBPS declared the outstanding payments immediately due, and the role of USBPS in administering the transactions. These assertions are not, as Defendants argue, conclusory; instead, they relate the factual events that precipitated this lawsuit and, as such, would be admissible as relevant evidence. I also give no credence to Defendants' argument that Fox lacked personal knowledge of the events she recounted. Fox did not make any statement "on information and belief," and, in the first paragraph of the affidavit, states she is "fully familiar with the facts and circumstances had herein." (Fox Aff. ¶ 1.) Additionally, I overrule Defendants' objection (presumably based on Federal Rule of Evidence 802) that Fox, as an employee of USBPS, does not have personal knowledge with regard to the business records of DVI that USBPS inherited after its appointment as successor servicer. The commentary to Rule 803(6) – a rule that excepts records of regularly conducted activity from the prohibition against hearsay – squarely rebuts Defendants contention:

> [U]se of the phrase "person with knowledge" is not intended to imply the party seeking to introduce the memorandum, report, record, or data compilation must be able to produce, or even identify, the specific individual upon whose first-hand knowledge the memorandum, report, record, or data compilation was based. . . . In

> short, the scope of the phrase "person with knowledge" is meant to be coterminous with the custodian of the evidence or other qualified witness.

Fed. R. Evid. 803(6) advisory committee's note. Therefore, it is unnecessary for USBPS to identify the person at DVI who had first-hand knowledge of the transaction documents. Fox, as "one of the employees at USBPS responsible for administering" the leases and loans, (Fox Aff. ¶ 2), is a "custodian or other qualified witness" under Rule 803(6). Thus, I hold that Fox's factual assertions in her affidavit, along with the exhibits, are competent evidence to be relied upon in adjudicating this motion. More significantly, viewing the evidence adduced in the light most favorable to Defendants, and drawing all reasonable inferences in their favor, I conclude there is no genuine issue for trial. *Anderson*, 477 U.S. at 248. USBPS is entitled to recover for breach of contract as a matter of law because a reasonable jury could not return a verdict for the non-moving parties.

Summary judgment is appropriate in a contract dispute when the terms of the agreement are clear and unambiguous, despite a disagreement over the legal significance of those terms. *Paul Revere Protective Life Ins. Co. v. Weis*, 535 F. Supp. 379, 383 (E.D. Pa. 1981). To prevail on its breach of contract causes of action under Pennsylvania law, USBPS must establish: (1) the existence of a contract and its essential terms; (2) a material breach of one of more of the terms; and (3) damages. *Gorski v. Smith*, 812 A.2d 683, 692 (Pa. Super. Ct. 2002) (citing *Corestates Bank v. Cutillo*, 723 A.2d 1053, 1058 (Pa. Super. Ct. 1999)). Here, USBPS demonstrated the absence of a factual dispute on each of these three requirements because it is undisputed that: (1) the Defendants and DVI entered into the contracts at issue; (2) the terms of the transaction documents place obligations on the Defendants to repay the amounts specified in each schedule and note; (3) USBPS became, by court order, the successor servicer of these transactions; and (4) since the fall of 2003

to the present, Defendants ceased making payments on these contracts.

To survive summary judgment in light of this evidence, the Defendants must "come forward with specific facts showing there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citing Fed. R. Civ. P. 56(e)). With regard to the leases, the Clear Sky medical centers do not dispute they ceased making payments, but argue there is a genuine issue for trial because USBPS has not established the occurrence of a condition precedent contained in each equipment schedule. Under the terms of each schedule, the lessee's obligations "will commence on the date on which Obligor executes and delivers to DVI a Delivery and Acceptance Certificate, in form and content acceptable to DVI, confirming Obligor's unconditional acceptance of the Equipment . . . ." (Pl.'s Mot. Summ. J. Exs. 7, 8, 9, 21, 26.) Specifically, Defendants contend USBPS "fail[ed] to plead and prove the execution and delivery of any Delivery and Acceptance Certificates as to any of the equipment as required by the terms of the schedules," (Defs.'s Resp. at 8), and reason, by implication, that their repayment obligations have never accrued.

Even if I were to construe this provision as a condition precedent, Defendants' argument is irrelevant for one simple reason. Section 2.1 of each Master Equipment Lease is a "hell or high water" provision, which makes each medical center's obligation to pay rent "absolute and unconditional" and "not . . . subject to any abatement, reduction, setoff, defense, counterclaim, interruption, deferment or recoupment for any reason whatsoever." (Pl.'s Mot. Summ. J. Exs. 6, 20, 25.) "Hell or high water" provisions (*i.e.*, clauses that contain an unconditional promise on the lessee's part to pay rent) are "strictly enforceable as a matter of law," and, in the context of summary judgment, there can be no issue of material fact because the lessee's liability is unequivocal. *Phila. Sav. Fund Soc'y v. Deseret Mgmt. Corp.*, 632 F. Supp. 129, 136 (E.D. Pa. 1985). The rationale for

this rule is motivated by a practical concern for the equipment leasing industry: "[T]o deny the[] effect [of hell or high water provisions] as a matter of law would seriously chill business in this industry" because these clauses provide meaningful security to prospective financiers and assignees of rental payments. *Id.*[4] Defendants do not contest the leases here contain "hell or high water" provisions, and I conclude, under the terms of each lease, Defendants are precluded from interposing any defense to their unconditional obligations to pay rent. In short, the medical centers have defaulted under each lease, and these defaults, according to the terms of the Cross Collateral/Cross Default Rider, constitute an event of default under every other contract between DVI and the Defendants.

To avoid summary judgment on Notes 3666-001 and 3239-001, Defendants assert their obligations never matured because DVI failed to "fully fund" them. (Defs.' Resp. at 10.) It is undisputed DVI loaned a significant portion of the face value of these notes to Defendants and that Defendants made regular payments toward satisfying their indebtedness until the third quarter of 2003, at which point the payments ceased. There is a factual dispute over whether the loans were fully funded, and, in the context of summary judgment, I must assume DVI failed to advance the funds Defendants claim were never forthcoming. This dispute, though, only relates to the amount USBPS is entitled to recover as damages; not whether the obligors are contractually liable for their promises to repay the loans because, under the Cross Collateral/Cross Default Rider, each Defendant:

---

[4]The same practical consideration is present here because Article 8.5 of each Master Equipment Lease expressly states: "DVI may at any time assign or grant participation in all or any portion of this Agreement or any Schedule and the amounts due thereunder without notice to or the consent of the Obligor." (Pl.'s Mot. Summ. J. Exs. 6, 20, 25.)

> (a) acknowledges, confirms and agrees that all obligations and liabilities of it to DVI . . . are and continue to be obligations and liabilities . . . ; (b) ratifies, confirms and acknowledges that its obligations . . . continue to be valid, binding, in full force and effect, and enforceable . . . ; [and] acknowledges and agrees that it has no defense, setoff, counterclaim or challenge against the payment of any sums owing under the Financing Documents . . . .

(Pl.'s Mot. Summ. J. Ex. 42.) (The "Financing Documents," as that term is used in the Cross Collateral/Cross Default Rider, includes all the contracts between DVI and the Defendants.)

Under Pennsylvania law, "[i]t is firmly settled that the intent of the parties to a written contract is contained in the writing itself." *Shovel Transfer & Storage, Inc. v. Pa. Liquor Control Bd.*, 739 A.2d 138 (Pa. 1999). "When the words of a contract are clear and unambiguous, the meaning of the contract is ascertained from the contents alone." *Mace v. Atl. Ref. Mktg. Corp.*, 785 A.2d 491, 496 (Pa. 2001) (citing *Steuart v. McChesney*, 444 A.2d 659, 661 (Pa. 1982)). Based on the terms contained in the Cross Collateral/Cross Default Rider, the intent of the parties is unmistakable: Defendants acknowledged and confirmed they are under a current, enforceable obligation to repay not only Notes 3666-001 and 3239-001, but also all other amounts due and owing under the various contracts. I need not reach USBPS's argument it is entitled to recover the face amount of these notes, regardless of DVI's alleged failure to fully fund them. That is an issue of contractual damages to be resolved at trial.

An appropriate order follows.[5]

---

[5]The guarantors of the leases and loans have not raised any arguments in opposition to Plaintiff's motion and presumably rely on those raised by the obligors to defeat contractual liability. Having concluded USBPS is entitled to recover contractual damages as a matter of law, I reach the same result with regard to its causes of action against the guarantors for breach of each Guaranty and Suretyship Agreement. The guaranties here are, according to their express terms, "unconditional," requiring the guarantors "to pay or perform a contract on default of the principal without limitation." *Paul Revere Protective Life Ins. Co.*, 535 F. Supp. at 384.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LYON FINANCIAL SERVICES, INC.,	:	CIVIL ACTION
d/b/a/ U.S. BANK PORTFOLIO	:	
SERVICES, for the benefit of	:	No. 05-3084
U.S. BANK NATIONAL ASSOCIATION,	:	
as Trustee	:	
	:	
v.	:	
	:	
CLEAR SKY MRI AND DIAGNOSTIC	:	
CENTERS, INC., et al.	:	

ORDER

AND NOW, this 10th day of August, 2006, Plaintiff's Motion for Partial Summary Judgment (Document 38) is GRANTED IN PART, and judgment on the issue of contractual liability is entered in favor of the Plaintiff on Plaintiff's First Claim for Relief through its Sixteenth Claim for Relief as set forth in the Complaint. The issue of contractual damages is RESERVED until trial.

It is further ordered that a telephone conference will take place on August 15, 2006 at 1:30

p.m. to discuss the scheduling of a bench trial on Plaintiff's remaining causes of action and the amount of contractual damages to which Plaintiff is entitled to recover. Counsel for Plaintiff is to initiate the call.

BY THE COURT:

/s/ Juan R. Sánchez
Juan R. Sánchez, J.